Supreme Court. U.S.

IN THE

## Supreme Court of the United States

OCTOBER TERM. 1989

ENCO MANUFACTURING COMPANY, INC.,

Petitioner.

VS.

CLAMP MANUFACTURING COMPANY, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

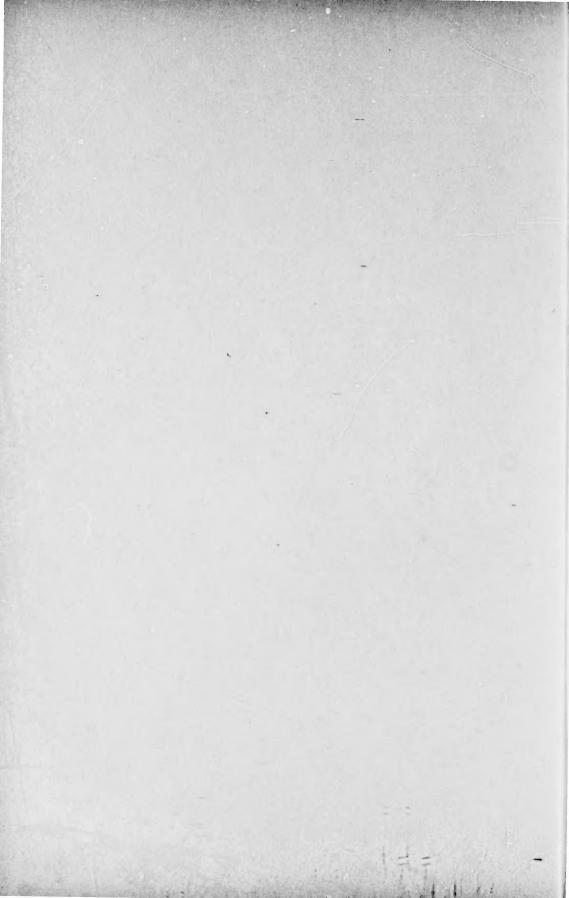
## RESPONSE TO SUPPLEMENT TO THE PETITION FOR WRIT OF CERTIORARI

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No. 89-199

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VS.

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# RESPONSE TO SUPPLEMENT TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

This response to the Supplement to the Petition for Writ of Certiorari addresses Petitioner's argument that a recent decision of the Fifth Circuit Court of Appeals allegedly reveals a conflict among the Circuits on the Third Question Presented for Review.

THE FIFTH CIRCUIT OPINION CITED BY PETITIONER DOES NOT CREATE A CONFLICT AMONG THE CIRCUITS, BUT SIMPLY PRESENTS A SITUATION, CONTRARY TO THE INSTANT ACTION, WHERE THE TOTAL ABSENCE OF FINDINGS BELOW PRECLUDED APPELLATE REVIEW.

Petitioner claims that the Fifth Circuit decision in Allied Marketing Group, Inc. v. CDL Marketing, Inc., No. 88-1747, slip op. (5th Cir. July 13, 1989) presents a conflict among the Circuits in that the Allied Marketing case allegedly is analogous to the instant action, wherein the Ninth Circuit affirmed the District Court's implied rejection of the laches defense because (1) it had no doubt that the District Court rejected the defense and (2) a full understanding of the issue was ascertainable from the findings entered by the District Court.

However, there is no conflict between the Circuits in that Petitioner's argument

fails to note a crucial distinction between the Allied Marketing case and the Ninth Circuit Opinion. Specifically, in the Allied Marketing case, the Fifth Circuit noted that the failure of the District Court to address certain defenses "impedes our ability to determine whether the District Court erred in its decision to grant a preliminary injunction." (App. In the instant action, the Ninth 50) Circuit concluded that a full understanding of the issue in question was ascertainable from the District Court's findings, which findings did address the relevant factors to the laches defense in question. (Petitioner's App. at p.5) In fact, the Ninth Circuit Opinion recited the District Court's specific findings relevant to the laches defense and made reference to the governing Ninth Circuit decision setting forth those factors. (Petitioner's App. 5-6)

Further, in the Allied Marketing case, the Fifth Circuit noted that the District Court opinion "lacks any indication that the court considered the arguments presented by [the appellant]." (emphasis in original) (App. 54) However, in the instant action, it is beyond dispute that the District Court had considered the arguments presented by Petitioner in connection with its laches defense, given the explicit findings of fact on the factors relevant to the laches defense entered by the District Court. (Petitioner's App. 5-6). Those findings did provide a sufficient basis for appellate review by the Ninth Circuit.

What the Fifth Circuit rejected in its Allied Marketing opinion was Allied's

invitation to evaluate the District Court's decision on the basis of presumed findings of fact and conclusions of law. In the instant action, the Ninth Circuit did not, in the first instance, have to presume any findings of fact, since it was reviewing specific findings on the elements of the laches defense, which findings left the Ninth Circuit with no doubt that the District Court had rejected this defense.

It is clear that appellate review under Rule 52(a), based upon the review of the opinions of the Fifth Circuit in the Allied Marketing case and the Ninth Circuit in the instant action, did not differ from Circuit to Circuit. There simply is no conflict between the Circuits in this regard.

### CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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#### No. 89-199

### IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

ENCO MANUFACTURING COMPANY, INC., Petitioner,

VS.

CLAMP MANUFACTURING COMPANY, INC., Respondent.

STATE OF CALIFORNIA )
COUNTY OF LOS ANGELES )

Donald A. Johnson being first duly sworn, deposes and says: I am a citizen of the United States and a resident of or employed in the county aforesaid. I am over the age of 18 years and not a party to the said action. My business addresss is 3550 Wilshire Blvd., Suite 916, Los Angeles, California 90010. On September 15, 1989, I served the within RESPONSE TO SUPPLEMENT TO THE PETITION FOR WRIT OF CERTIORARI on the interested parties in said action by placing three true copies thereof with first-class postage fully prepaid, in the United States post office mailbox at Los Angeles, California, in sealed envelopes addressed as follows:

CHARLES A. LAFF, ESQ.
LOUIS ALTMAN
LARRY L. SARET
LAFF, WHITESEL, CONTE & SARET
401 North Michigan Avenue, Suite 2000
Chicago, Illinois 60611

That affiant makes this service, for ALLAN GABRIEL, Counsel of Record, ERVIN, COHEN & JESSUP, Attorneys for Respondent herein, and that to the best of my knowledge all persons required to be served in said action have been served.

Donald A. Johnson

On September 15, 1989, before me, the undersigned, a Notary Public in and for said County and State, personally appeared Donald A. Johnson, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

WITNESS my hand and official seal.

OFFICIAL SEAL
Theodore Matsuo Wilden
NOTARY PUBLIC - CALIFORNIA
LOS ANGELES COUNTY
My comm. expires NOV 30, 1990

Notary Public in and for said County and State

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